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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC DEAN HABERMEHL,

Defendant and Appellant.

G040067

(Super. Ct. No. 06NF1682)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Michael Anthony Hernandez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Eric Dean Habermehl worked as the finance director for an automobile dealership. The prosecution charged him with two counts of grand theft, presenting evidence that he twice appropriated all or part of a cash deposit the dealership received from a customer as the down payment for a vehicle purchase. The jury convicted defendant on one charge and acquitted him on the second count. The trial court placed defendant on three years probation, a condition of which required him to submit to drug testing as directed by his probation officer or other peace officer.

Defendant claims there is no evidence he used drugs and consequently the trial court both abused its discretion and violated his constitutional right to privacy by imposing the drug-testing condition. Respondent contends defendant forfeited this issue by failing to object when the court imposed the condition and that, in any event, the condition is valid. We affirm.

## DISCUSSION

### *1. Defendant's Failure to Object to the Drug-testing Condition*

Before discussing the merits of defendant's claims, we confront a procedural issue, defendant's conceded failure to object to the drug-testing probation condition when the court imposed it.

In *People v. Welch* (1993) 5 Cal.4th 228, the Supreme Court held failure to timely object to a probation condition forfeits the party's right to attack it on appeal on the basis the condition is unreasonable under the standards announced in *People v. Lent* (1975) 15 Cal.3d 481. (*People v. Welch, supra*, 5 Cal.4th at pp. 230, 237.) In part, defendant argues the drug-testing probation condition is "arbitrary and capricious, and in derogation of fundamental principles of policy" because "the probation report provided no indication that [he] had either used or abused narcotics," and "[t]he record is completely devoid of any reasoning for the imposition of th[is] . . . condition." Because

this argument goes to the reasonableness of the condition, defendant's failure to timely object to it at the sentencing hearing resulted in a forfeiture of his attack on that ground.

As noted, defendant also attacks the drug-testing condition on constitutional grounds, claiming it violates his right to privacy. *In re Sheena K.* (2007) 40 Cal.4th 875 holds an appellate "challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth" (*id.* at p. 887) that presents "a pure question of law" (*id.* at p. 888) is "not forfeited by . . . failure to raise it in [the trial] court." (*Id.* at p. 889.) To support his constitutional argument, defendant again cites on the absence of any "mention of . . . prior drug use" or "suggest[ion] that drugs played [a] role in the purpose or commission of the charged offenses" in the probation reports, plus his absence of "a [prior] criminal history" or "social history . . . that he has ever used illegal narcotics." He also argues "the condition is clearly not specifically tailored for him" because "the trial court failed to make any determination . . . the . . . condition was specifically for [his] reformation or rehabilitation."

Since this claim is also based on the appellate record it does not fall within the narrow exception recognized by *Sheena K.* Where the "'circumstances . . . do not present 'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court[.]' . . . '[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court.' [Citation.]' [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889; see also *People v. Murillo* (Feb. 18, 2009, H032409) \_\_ Cal.App.4th \_\_, \_\_ [2009 WL 387022, at p. 4].) Thus, "the alleged defects . . . cannot be determined or potentially corrected based on abstract and generalized legal principles and without reference to the particular facts and circumstances of this case." (*People v. Murillo*, *supra*, \_\_ Cal.App.4th at p. \_\_ [2009 WL 387022, at p. 5].) Defendant's constitutional claim is also forfeited by the failure to timely challenge the drug-testing condition.

## 2. *The Validity of the Drug-testing Condition*

Alternatively, defendant contends that if an objection was necessary, his trial attorney's failure to do so constituted ineffective assistance of counsel. In light of the principles governing claims of incompetent representation in criminal cases, we shall briefly explain why the trial court properly exercised its discretion by imposing the drug-testing condition. (*People v. Murillo, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2009 WL 387022, at pp. 3-4].) Defendant's attack on both the reasonableness and constitutionality of the drug-testing condition lack merit.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.] 'The court may impose and require . . . [such] reasonable conditions[] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.' (Pen. Code, § 1203.1, subd. (j).)" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.)

"Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long the condition is reasonably related to preventing future criminality. [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380; see also *People v. Carbajal, supra*, 10 Cal.4th at p. 1121.)

*People v. Balestra* (1999) 76 Cal.App.4th 57, a criminal prosecution for elder abuse, upheld the validity of a probation condition requiring the defendant to submit to alcohol and drug testing at the probation officer's discretion, and the analogous requirement that he waive his search and seizure rights under the Fourth Amendment. The appellate court found both conditions valid because they were "intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws.'" (*Id.* at pp. 67, 69; see also *In re Kacy S.* (1998) 68 Cal.App.4th 704, 710 [since "testing . . . is designed to detect the presence of substances whose use . . . is unlawful," the condition "is also "reasonably related to future criminality""].) Here, the drug-testing condition is relevant to both preventing future criminality and precluding criminal conduct. Contrary to defendant, there is no case authority requiring a court to make an express finding as to the purpose for imposing a drug-testing condition. Thus, his attack on the reasonableness of the condition fails.

Defendant's constitutional claim fares no better. Again, case law has rejected constitutional objections in the analogous context of a probation search condition. "[A] probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection." (*People v. Mason* (1971) 5 Cal.3d 759, 765, fn. omitted, disapproved on another ground in *People v. Lent*, *supra*, 15 Cal.3d at p. 486, fn. 1; see also *People v. Bravo* (1987) 43 Cal.3d 600, 607 ["Consequently, 'when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search . . . , he voluntarily waived whatever claim of privacy he might otherwise have had'"].)

The same is true when a probation condition requires a defendant to submit to drug tests. *In re Kacy S.*, *supra*, 68 Cal.App.4th 704 upheld a urine testing probation condition against a constitutional right to privacy attack, concluding that, not only are "a

probationer's expectations of privacy . . . diminished by his probation status," but because the government has a strong interest in both protecting the public and rehabilitating a probationer, "[t]he testing condition is a reasonable intrusion upon a probationer's expectations of privacy. [Citation.]" (*Id.* at p. 711.)

Consequently, we conclude the trial court did not err by imposing the drug-testing probation condition in this case.

#### DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.